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84-346

Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

BARRY MINTZES,

Petitioner,

vs. No. _____

ROY WILSON,

Respondent.
_____/

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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JURISDICTION

The jurisdictional statement of the Petitioner is adequate.

QUESTIONS PRESENTED

I. Whether this case is so unique and limited to its facts that it will affect few others than the litigants and therefore does not involve any important questions of federal law.

II. Whether the decision of the Sixth Circuit was correct in finding that Respondent was denied the right to be represented by counsel of his own choice when the trial court refused to allow Respondent to obtain substitute counsel in mid-trial when defense counsel angrily announced to the jury that he was quitting the case.

III. Whether it is appropriate for Petitioner, the State of Michigan, to raise for the first time before this Court an argument which was not presented to the federal courts below regarding whether the trial court made a finding of fact which is entitled to the presumption of correctness under 28 USC §§2254(d).

STATEMENT OF THE CASE

Respondent Roy Wilson was convicted of raping the complainant, Ethel Mills, who admitted that she was a prostitute and heroin addict. She also admitted that she had shot heroin earlier on the day of the alleged rape, October 11,

1973, that she was suffering from withdrawal on the night of the alleged rape, and that she was allegedly kidnapped while walking to a friend's home where there was heroin. She denied that she solicited Mr. Wilson (T II, Vol. II, pp. 30-39).[1]

Except for those parts of the Petitioner's Statement of the case which are argumentative and conclusory, the Petitioner's Statement adequately summarizes the facts in the case. The quarrels between defense counsel and the trial judge and the colloquies between the trial judge and the Respondent should, however, be examined in their entirety (T II, Vol. II, pp. 97-109; Petitioner's App. 26a-36a; Vol. III, pp. 2-7) Respondent's App. 1b-6b).

ARGUMENT

I. NO IMPORTANT QUESTIONS OF FEDERAL LAW ARE PRESENTED BECAUSE THE DECISION OF THE SIXTH CIRCUIT TURNS UPON THE UNIQUE FACTS OF THIS CASE AND IS NOT LIKELY TO AFFECT OTHERS THAN THE LITIGANTS.

In this case the trial judge initiated a quarrel with defense counsel over an insignificant point. During cross-examination of the officer in charge of the case, defense counsel asked to see the search warrant, and was inter-

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[1] The letter "T" refers to the trial transcript, the Roman numeral "I" to the first trial, the Roman numeral "II" to the second trial, the Roman numeral following "Vol." to the volume of the transcript, and the Arabic numbers to the page numbers.

rupted by the judge who told him saracastically he could get the file from the 11th floor of the court building (T II, Vol. II, pp. 97-98). The judge excused the jury and questioned defense counsel about his preparation of the case (T II, Vol. II, pp. 98-100). After the judge suggested that defense counsel was inadequately prepared, he asked the defendant if he wanted to continue with counsel as his lawyer, and the defendant twice said no (T II, Vol. II, pp. 100-101). The judge asked if he could afford new counsel, and the defendant requested to talk to his family (T II, Vol. II, pp 101-104). Defense counsel threatened to leave the courtroom and moved for a mistrial, which the judge denied (T II, Vol. II, pp. 104-107). The jury was brought back in, and in their presence defense counsel said he was under arrest, that he was no longer representing the defendant, that he refused to continue the trial because of some unspecified things said to the defendant by the judge while the jury was out, refused to complete the cross-examination of the officer in charge, and requested a mistrial in front of the jury. The judge denied that and told the prosecutor to call his next witness, but the prosecutor tactfully declined and was granted an adjournment to the next day (T II, Vol. II, pp. 107-109).

When trial resumed the next day, the defendant himself said repeatedly that he was not satisfied with his lawyer and thought that the outbursts in front of the jury had prejudiced his right to a fair trial, implicitly requesting a

mistrial, but the judge completely ignored him (T II, Vol. III, pp. 2-7).

The Sixth Circuit held that on the circumstances of this case, Respondent had good cause to request to hire new counsel even though the trial was in progress. The court found that Respondent was not at fault, that he was prejudiced by his attorney's petulant outburst before the jury, and that in that outburst counsel abandoned his client's interests and was protecting himself instead. Petitioner's assertion that this case has far-reaching implications because it will encourage criminal defense lawyers to engage in unprofessional conduct when a case is going badly is ridiculous. That assertion is belied by the infrequency with which facts of this sort ever result in a claim of error on appeal.[2] Since the decision below is limited to the facts of this case, it does not warrant review by this Court.

II. THE SIXTH CIRCUIT CORRECTLY FOUND THAT RESPONDENT WAS DENIED THE RIGHT TO BE REPRESENTED BY COUNSEL OF HIS OWN CHOICE.

The Sixth Circuit found that because defense counsel improperly sought to resign from the case in mid-trial, and behaved "inexcusably" in front of the jury, Respondent had good cause to ask to retain new counsel, and the trial court

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[2] In all of this counsel's research, there were no reported cases found which involved misconduct of this nature.

should have heeded Respondent's repeated requests.[3] (Petition, App. 8a-9a). As the Court said:

> [W]e hold that petitioner did in fact have good cause to request new counsel and that the trial court's denial of petitioner's request deprived petitioner of his Sixth Amendment right to effective assistance of counsel.

Petitioner has restated the issue here as one of effective assistance of counsel which requires analysis of counsel's actual performance under Strickland v Washington, _____US _____, 80 L Ed 2d 674, 104 S Ct _____ (1984). However, the issue is not so much one of "effectiveness" as it is deprivation of the right to counsel of one's own choice.

In Strickland, this Court recognized that when a defendant is deprived of counsel, prejudice is presumed. 80 L Ed 2d at 696. See also, Holloway v Arkansas, 435 US 475, 489 (1978); Glasser v United States, 315 US 60, 75-76 (1941). As this Court said in Faretta v California, 422 US 806, 821 (1975):

> An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense.

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[3] The Sixth Circuit did use the terms "effective assistance of counsel" and "conflict of interest" in describing its holding. Respondent maintains, however, that under a closer analysis, this is a deprivation of the right to counsel case, not an ineffective assistance of counsel issue.

When Respondent was refused an opportunity to retain new counsel, he was deprived of his right to counsel of his own choosing. Prejudice is presumed in these circumstances, because representation by an unwanted counsel is akin to no representation at all. Linton v Perini, 656 F 2d 207 (CA 6, 1981), cert. den., 454 US 1162 (1982). Prejudice is only a relevant factor in substitution of counsel cases in determining whether a defendant had good cause to request substitution in the first place. Linton v Perini, supra. Once it is determined that a defendant has good cause for substitution, counsel's actual performance is irrelevant if unwanted counsel is forced upon the defendant. The Sixth Circuit thus focused its attention here on the facts leading to Respondent's request to hire a new lawyer and did not address the claims that the rest of counsel's performance was ineffective raised as alternative grounds for relief in Respondent's brief below. (See petitioner Wilson's Sixth Circuit brief, pp. 21-24, Respondent's App. 7b-11b).

The holding of the Sixth Circuit that Respondent was prejudiced and therefore justified in seeking substitution of counsel is obviously correct. Trial counsel abandoned his client to protect his injured pride. Contrary to Petitioner's assertion, it is clear from the context of the trial transcript that counsel's refusal to resume the cross-examination of Officer Martini was due to a temper tantrum, not a tactical choice (T II, Vol. II, pp. 107-109). That refusal to continue questioning, however, was just one of the reasons for

the Sixth Circuit decision that counsel's conduct was prejudicial. The rest of counsel's angry outburst in front of the jury was prejudicial too. The jury was sent out when the judge started the quarrel with counsel, and much of the argument took place while the jury was out (T II, Vol. II, pp. 97-106). The judge brought the jury back in when defense counsel was still obviously angry at the court's unnecessary goading and insults. When counsel told the jury he was quitting the case, he said in part:

> I refuse - I'm telling the jury right now, I refuse to conduct this case in this courtroom after what has been said by the Court to my client while the jury was in the jury box [sic]. (T II, Vol. II, p. 108).

The jury could thus have easily concluded that it was Respondent who had done something improper to stir up this hornet's nest, not the lawyer and the judge. The Sixth Circuit properly concluded that on these facts Respondent should have been allowed to obtain new counsel, and Petitioner has not demonstrated that this conclusion was in error or merits review.

III. THE PETITION IMPROPERLY RAISES FOR THE FIRST TIME AN ARGUMENT THAT WAS NOT PRESENTED TO THE FEDERAL COURTS BELOW.

The Michigan Court of Appeals said that when trial resumed on the day after defense counsel's outburst, the defendant apparently resolved his dissatisfaction with defense

counsel, because he did not pursue the matter further. This statement is obviously wrong because when trial resumed, Respondent said four times that he was dissatisfied with his lawyer's conduct and that it had prejudiced his right to a fair trial (T II, Vol. III, pp. 2-7). The District Court noted the error of that conclusion and found it was not entitled to a presumption of correctness under 28 USC §§2254(d)(8), because it was not supported by the record (Memorandum Opinion, Petitioner's App. 21a).

In the Sixth Circuit, Petitioner argued that the conclusion of the Michigan appellate court that Respondent had effective consel was entitled to the presumption of correctness. The Sixth Circuit rejected this argument on the grounds that such conclusions are not entitled to the presumption, because they are legal and not factual in nature, which is consistent with Strickland, supra.

Petitioner now abandons that argument and, for the first time, advances in this Court the argument that the trial court made a finding that Respondent was not prejudiced which is entitled to the presumption. Since this argument was not presented to the federal courts below, it should not be entertained for the first time here. Steagald v United States, 451 US 204, 208 (1981); Raper v Mintzes, 706 F 2d 161 (CA 6, 1983).

Even if this court were to entertain that argument now, the finding of no prejudice by the trial court is not fairly supported by the record. Two days after defense

counsel's outburst, the trial judge instructed the jury that they should not be affected by the conduct of an attorney. He then asked the jury a leading question whether they were prejudiced by the conduct of the attorneys in the case. Not surprisingly, no juror responded (T II, Vol. IV, pp. 10-12; Petitioner's App. 40a-41a). As Respondent argued in the Sixth Circuit, the brief and leading nature of the voir dire, following as it did the cautionary instruction that the jurors should not be prejudiced, did nothing to cure the prejudice. The cases cited by Petitioner regarding juror bias are distinguishable on the depth of the questioning of the jurors as well as on the nature of the prejudice involved. This issue also does not merit review.

CONCLUSION

For the foregoing reasons a writ of certiorari should not issue to review the decision of the Sixth Circuit, and a remand for reconsideration under Strickland v Washington, supra, is unnecessary.

Respectfully Submitted:

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Dated: October 4, 1984.

APPENDIX

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EXCERPT OF TRANSCRIPT OF TRIAL PROCEEDINGS
December 8, 1976

December 8, 1976

Detroit, Michigan

THE COURT: Continuation of Roy Wilson case.

MR. PATTERSON: Before you bring the jury out, I have a motion. There's something I want to put on the record.

THE COURT: All right.

You may proceed Mr. Patterson.

Mr. Patterson, do you have any more questions of Sergeant Martini?

MR. PATTERSON: I have no other questions of the Sergeant. I believe my client wants to make a statement.

DEFENDANT WILSON: I just want to say that I believe the events that took place yesterday; I believe they affected the trial.

THE COURT: They what?

DEFENDANT WILSON: They affected this trial to some degree and I don't think I really would have a fair trial.

THE COURT: The jury was not here when that took place.

The question was whether your lawyer had properly prepared. I was trying to protect your rights. It became evident during the trial that your lawyer was asking questions. If he had properly prepared and read the court file, he would not have asked them.

MR. PATTERSON: Now let me make this statement for the record. I think that remark obviously is the opinion of the Court in terms of my preparation for this case. Our office -- I have had an opportunity to talk tothe partners in our office and our office was retained three years ago in this case. And this case was taken to the Court of Appeals and the Supreme Court by our office and the case was reversed in the Supreme Court as this Court knows.

Now in the process of having done that, our office had made copies of the court file. I indicated on the record yesterday that I had read the transcript twice and I had read our file twice, which is my standard preparation in every case.

THE COURT: My concern was, you had never looked at a court file in your life.

MR. PATTERSON: That is correct; at a court file upstairs.

THE COURT: All right. And it became evident yesterday --

MR. PATTERSON: Let me also say this --

THE COURT: You also never checked the search warrant file and you had no idea what file room the search warrants were kept in.

MR. PATTERSON: I don't believe that is true either. I think the Court indicated that the search warrant was in the court file.

THE COURT: No --

MR. PATTERSON: That is what the Court indicated.

THE COURT: It is in the court file room.

MR. PATTERSON: Okay. That's not what I understood --

THE COURT: The search warrant has a different number. Trial files are kept on the ninth floor. Search warrants are kept in a seperate file room on the 11th floor and it was evident that you were not aware that they were in two seperate files. It became evident that you had never gone up and looked for them. However, it did come out on the record that the Prosecutor had furnished you a copy --

MR. PATTERSON: At my request.

THE COURT: -- a copy of the search warrant yesterday the second day of trial.

MR. PATTERSON: I believe I saw the search warrant before the case ever started.

MR. LA BRET: Your Honor, I believe that before the case ever began I showed Mr. Patterson a copy of the search warrant.

MR. PATTERSON: I should also say there's a copy of the search warrant in our file in our office.

THE COURT: But the fact remains that you wanted to see it from the file and it's not in the file. It's a separate document; a separate file number kept in a separate location in the file rooms on the 11th floor.

MR. PATTERSON: Let me also say this. I know exactly what the search warrant had said and I knew what the return said before I ever asked for it.

MR. LA BRET: I think perhaps we had a gross misunderstanding.

MR. PATTERSON: It had to do with panties and panty hose.

THE COURT: All right. Are we ready to proceed today?

MR. LA BRET: Yes sir, we are.

THE COURT: And you're satisfied with your lawyer, Mr. Wilson?

MR. PATTERSON: Let me make one last statement. I want to get this in the record --

DEFENDANT WILSON: No. I made a statement that I wasn't satisfied.

THE COURT: You're what?

DEFENDANT WILSON: I am not satisfied with the events that took place yesterday.

THE COURT: You may not be satisfied -- I'm trying to protect your rights, Mr. Wilson. When I found out your lawyer, one, had never read the court file; two --

MR. PATTERSON: Upstairs.

THE COURT: Upstairs, although he may have a complete copy in his office; he probably does have but I'm not sure.

MR. PATTERSON: The Court's calling me a liar?

THE COURT: No, I'm not calling you a liar; I said you have never read the original court file. You made that statement on the record.

MR. PATTERSON: That's right.

THE COURT: And at that time I wanted to bring that to Mr. Wilson's attention because I think the minimum of any lawyer's preparation is to look at the court file.

MR. PATTERSON: And I also indicated on the record yesterday, I had read our file and that I had read our file twice.

THE COURT: All right. This all took place outside the presence of the jury. The jury was not tainted in any way by the statements.

DEFENDANT WILSON: The jury saw what happened, what went on --

THE COURT: The record will show -- the jury heard some statements made by your lawyer, not by the Court.

MR. LA BRET: May I proceed sir?

THE COURT: You may proceed. Put your first witness on.

Bring out the jury.

(Jury returned to courtroom)

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EXCERPT FROM RESPONDENT ROY WILSON'S
SIXTH CIRCUIT BRIEF ON APPEAL

reason his lawyer was trying to quit as to conclude it was the lawyer's or judge's fault. The fact that the judge conducted a brief, leading voir dire of the jury the next day on the subject of courtroom altercations would not have removed the prejudice. (T.II, Vol. IV, pp. 11-12).

The alternatives open to the trial court when the defendant requested a mistrial so that he could replace his lawyer were: 1) grant the mistrial; 2) deny the mistrial and allow a continuance to see if new counsel could be quickly obtained to continue the trial, perhaps another attorney from the same law firm; or 3) force the trial to continue with Mr. Patterson representing the defendant. The only reasonable alternative was to grant the mistrial to allow the defendant to obtain new counsel. Since the requests were by defense counsel and the defendant, double jeopardy problems would not arise because of the defendant's consent. People v. Benton, 402 Mich 47, 260 NW2d 77 (1977). While normally the declaration of a mistrial is within the discretion of the trial court, where the trial court unnecessarily goaded defense counsel into the angry outburst which is the subject of the mistrial request by the defendant, little or no deference should be paid to the trial court's decision. Since there was no reasonable alternative to a mistrial to cure the prejudice, there was a "manifest necessity" to take the case away from the jury. People v. Jackson, 100 Mich App 146, 160 298 NW2d 694 (1980); People v. Walters, 8 Mich App 400, 154 NW2d 542 (1967).

The state Court of Appeals also concluded that no prejudice resulted because a skillful defense was conducted. Mr. Patterson's statement to the jury that he was no longer the lawyer on the case was in complete derogation of his responsibility to his client, hardly a hallmark of a skillful defense. He also failed to cross-examine the officer in charge of the case. He failed

to cite any cases to the court when he requested instructions on lesser included offenses.[2.] (T.II, Vol. IV, p.10). He called a defense witness, Sara Patterson, whose testimony was so damaged by the prosecutor's cross-examination that it made the defense theory of the case seem much weaker. (T.II, Vol. IV, pp. 12-30). Defense counsel, had he adequately interviewed her prior to calling her, should not have put her on the stand. He failed to object to the prosecutor's personal vouching for the character of the complainant.[3.] (T.II, Vol. IV, pp. 35; 44-45). He delivered a brief, perfunctory closing argument in a capital offense. (T. II, Vol. IV, pp. 39-43). He failed to object to several erroneous instructions to the jury.[4.] (T. II, Vol IV, p. 61). He also completely failed to assist the defendant at sentencing. (T.II, Vol. IV, p. 66). Such shortcomings suggest that, contrary to the decision of the Court of Appeals, the defendant was prejudiced by being forced to continue trial with a lawyer who had tried to remove himself from the case

2. Michigan case law at the time of this trial would have warranted giving instructions on the lesser included offenses requested by defense counsel, People v. Alcala, 63 Mich App 120 234 NW2d 172 (1975).

3. The prosecutor's personal vouching for the credibility of the complainant based on his contacts with her between the first and second trials was grossly improper. People v. Perkins, 116 Mich App 624, 629 323 NW2d 311 (1982).

4. The court gave the jury instructions which were apparently drawn from the first trial but which related to evidence that was not presented in the second trial (T. II, Vol. IV, p. 56):

> If you find that before this trial, the defendant made false or deliberate misleading statements, concerning the charge upon which he is now being tried, you may consider such statements as circumstances tending to prove consciousness of guilt. The weight to be given such circumstances, and its significance, if any, are matters for your deliberations. Evidence, that the defendant attempted to persuade a witness to testify falsely to the Police Department may be considered by you as circumstances tending to show consciousness of guilt, and its weight or significance, if any, are matters for your determination.

and effectively did so by putting forth no more than a perfunctory effort after the defendant said he no longer wanted him as defense counsel.[5] The Court of Appeals noted that the defendant was still represented on appeal by the same law firm, but that is of no moment. A different attorney than Mr. Patterson handled the case there, and the defendant's use of the same law firm on appeal is by no stretch of the imagination a ratification of the conduct of his trial counsel from the same office or a sign that he had resolved his dissatisfaction with him. See United States v. Johnston, supra.

> Evidence that a defendant attempt to suppress evidence by tearing up a piece of paper in his property, may be considered by you. If you find it to be true, of course, and if you believe the witness, it may be considered by you as circumstances tending to show consciousness of guilt. However, such evidence is not sufficient in itself to prove guilt, and its weight and significance, if any, are matters for your consideration.

There was no evidence presented in the second trial that the defendant made any statements, though evidence of an exculpatory statement was permitted in the first trial. (T. I, Vol. II, p. 104). There was no evidence at the second trial that the defendant tried to persuade anyone to give a false statement to the police, but evidence that he told Debra Coleman to lie to the police was admitted in the first trial. (T. I, Vol. I, pp. 224-228). There was no evidence in the second trial that the defendant destroyed any evidence, but there was testimony in the first trial that he ate a pice of paper. (T. I, Vol. II, p. 49). Defense counsel objected to none of these instructions.

The judge also gave a muddled and incorrect instruction on the prosecutor's failure to produce the physician who examined the complainant to which defense counsel failed to object. (T. I, Vol. IV, p. 57). Not only did the instruction incorrectly water down the prosecutor's duty to use "due diligence" in locating res gestae witnesses to "reasonable pains", (See People v. Johnson, 51 Mich App 244, 214 NW2d 713 (1974)), but the instruction also failed to tell the jury that if they found a lack of due diligence they could presume that the missing witness would have testified favorably to the defendant. People v. Gibson, 253 Mich 476, 478; 235 NW 225 (1931).

5. Defense counsel's performance earlier in the trial was also not skillful. He failed to file a motion to suppress the defendant's record prior to the second trial. Although such a motion had been denied before the first trial, the judge's ruling was clearly erroneous. See Part II, infra.

Defense counsel also failed to impeach the complainant with her prior testimony that she had been married and divorced (T. I, Vol. I, pp. 106-107 and Vol. II, p. 165 vs. T. II, Vol. II, p. 41); and whether she was a prostitute at the time of the alleged rape (T. I, Vol. I, p. 86 v,s. T. II, Vol. II, p. 33).

Since the conclusions of the state appellate court are not supported by the record and since the defendant was deprived of his fundamental right to counsel, this Court should reverse the decision of the District Court and grant the defendant the relief requested.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

BARRY MINTZES,

Petitioner,

vs. No. _____

ROY WILSON,

Respondent.

_____/ PROOF OF SERVICE

STATE OF MICHIGAN)
: SS
COUNTY OF WAYNE)

ROSE ANN LAWREY, first being duly sworn, deposes and says that pursuant to instructions given by her employer she did on the 4th day of October, 1984, serve a true copy of Motion to Proceed In Forma Pauperis and Brief for Rspondent in Opposition in the above entitled cause upon: Thomas A. Kulick, Assistant Attorney General, Corrections Division, Criminal Appeals Section, Plaza One Building, 401 S. Washington Square, Lansing, MI 48913, by enclosing the same in an envelope properly addressed as aforesaid with sufficient postage prepaid thereon and deposited same in the United States Mails at Detroit, Michigan.

Rose Ann Lawrey

Subscribed and sworn to before me
this 4th day of October, 1984.

Notary Public

EDITH E. KING
Notary Public, Oakland County, MI
My Commission Expires Oct. 2, 1988